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ABSTRACT

This booklet presents information to help guide college and university administrators in properly (legally) handling those situations in which employees reveal evidence of fraud, abuse, or other illegal activity occurring within the school. Part I describes in general terms the whistleblower protection provisions found in various federal statutes and regulations. Part II examines the typical elements of state statutes that protect whistleblowers. Part III briefly outlines the "public policy exception" to the doctrine of employment-at-will which, in some states, provides common law protection for whistleblowers. Part IV provides practical strategies to: (1) avoid claims of retaliation from an employee who has either disclosed or plans to disclose alleged employer misconduct; and (2) minimize the risk of potential liability to such an employee should that employee file suit. (Contains 74 references.) (GLR)

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Responding to Whistleblowers

An Analysis of Whistleblower Protection Acts and Their Consequences

PHILIP BURLING
KATHRYN A. MATTHEWS

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National Association of College and University Attorneys

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Philip Burling is a graduate of Harvard College, Oxford University and Harvard Law School. He is a partner in the Boston law firm of Foley, Hoag & Eliot. Since 1972, Mr. Burling has been University Counsel to Boston College. He specializes in school and college law, representing several New England secondary and post-secondary educational institutions. He is a member of the Risk Management Advisory Committee of United Educators/SCUUL. Among his community activities, Mr. Burling is Chairman of the Trustees of the Rockport Apprenticeshop and Secretary of New England Medical College.

Kathryn A. Matthews is a graduate of Stanford University, Phi Beta Kappa, with distinction, and Harvard Law School, magna cum laude. She is an associate in the Boston law firm of Foley, Hoag & Eliot.

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Responding to Whistleblowers

An Analysis of Whistleblower Protection Acts and Their Consequences*

> *"Whistleblower: An employee who refused to engage in and/or reports illegal or wrongful activities of his employer or fellow employees."*
> BLACK'S LAW DICTIONARY 1596 (6TH ED. 1990).

Introduction

In the nineties, colleges and universities will find themselves wrestling with employees who, protected by the armor of newly-enacted whistleblower protection statutes, feel free to announce their moral disagreement with their employer's conduct or their uneasiness with a potentially illegal action regardless of the impact of that announcement on their employer's business or reputation. To make matters worse, Congress has made many such declarations rewarding. In its enthusiasm to promote whistleblowing as a low-cost way to reduce fraud and abuse among government contractors, Congress has resuscitated the long-dead device of the "qui tam" suit, which authorizes a private party to sue to recover, on behalf of the government, money paid out by the government as a result of false claims. The qui tam provision of the federal False Claims Act is attractive to a potential whistleblower because a qui tam plaintiff, in certain circumstances, can keep up to 25 percent of the amount recovered on behalf of the government.

Institutions facing these bewildering changes in their relationships with employees and government agencies may reasonably feel quite uneasy. Most college and university administrations have never dealt with an individual on campus who has the panoply of rights that a whistleblower has. Indeed, the ramifications of this situation may be quite startling to some administrators. Today, a college or university must carefully plan even a preliminary meeting with a potential whistleblower because the whistleblower may later quote even

* The authors wish to express their thanks to Colleen A. Brown, who as a summer associate from Northeastern Law School did much of the research for this project.

the slightest expression of disbelief by the institution's personnel as evidence of retaliation or cover-up.

For a number of reasons, including altruistic as well as financial, increasing congressional, regulatory and media interest in contract and research fraud will encourage whistleblowers to come forward with greater frequency. Thus, it is imperative that all institutions of higher education know how to react when an employee announces that he has discovered evidence of fraud, abuse or illegal activity which he feels compelled to expose. This is especially true if the whistleblower claims the institution or its personnel has committed research fraud or submitted false claims to the government. In these situations an institution not only faces huge financial penalties, but also risks its ability to qualify for future government funding.

Part I of this monograph describes in general terms the whistleblower protection provisions found in various federal statutes and regulations. Part II examines the typical elements of state statutes which protect whistleblowers. Part III briefly outlines the "public policy exception" to the doctrine of employment-at-will which, in some states, provides common law protection for whistleblowers. Various elements of these three sections are somewhat technical, but they are intended to provide essential background information for college and university administrators and to serve as a quick reference tool for college and university lawyers. Part IV is a considerably less technical discussion of practical strategies first to avoid claims of retaliation from an employee who has disclosed or plans to disclose alleged employer misconduct, and then to minimize the risk of potential liability to such an employee should that employee file suit under any of the provisions or theories discussed earlier in the monograph.

Whistleblower Protections Under Federal Law

In 1989 Congress passed and President Bush signed the Whistleblower Protection Act, which forbids federal employers from taking retaliatory action against any federal employee who blows the whistle.[1] Federal protection of state and private sector employees is less comprehensive.

Federal Whistleblower Provisions Within More General Statutes

Instead of offering a single remedy to all state and private sector employees discharged or discriminated against because they reported a suspected violation of law, federal law provides varying degrees of protection for non-federal employees by inserting particular whistleblower provisions into other more general statutes.[2] For ease of analysis, these statutes can be grouped into the following categories: (1) environmental; (2) labor relations; (3) workplace health and safety; and (4) discrimination in the workplace.[3]

In this strategy of dispersal, an employee who believes his employer plans to or has already discharged him or has discriminated against him in retaliation for reporting a violation of a federal statute, must file his claim under the whistleblowing provisions found in the statute which he alleges the employer has violated. For example, an employee who believes he was retaliated against because he disclosed a workplace safety violation under the

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1. Pub. L. 101-12, 103 Stat. 16 (1989), codified at 5 U.S.C. § 1201 et seq. and elsewhere.

2. The following statutes contain provisions which protect employees who report suspected violations by their employers:

1. Age Discrimination in Employment Act, 29 U.S.C. § 623(d);
2. Civil Rights Act of 1871, 42 U.S.C. §1983;
3. Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-4(a);
4. Civil Service Reform Act, 5 U.S.C. § 2302;
5. Clean Air Act, 42 U.S.C. § 7622;
6. Employee Retirement Income Security Act, 29 U.S.C. § 1140;
7. Energy Reorganization Act, 42 U.S.C. § 5851;
8. Fair Labor Standards Act, 29 U.S.C. § 215;
9. False Claims Act, 31 U.S.C. § 3734;
10. Federal Mine Health and Safety Act, 30 U.S.C. § 815(c);
11. Job Training and Partnership Act, 29 U.S.C. § 1574;
12. Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. § 1855;
13. Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1855;
14. National Labor Relations Act, 29 U.S.C. § 158(a)(4);
15. Occupational Safety and Health Act, 29 U.S.C. § 660(c);
16. Safe Containers for International Cargo Act, 46 U.S.C. § 1506;
17. Safe Drinking Water Act, 42 U.S.C. § 300-j-9;
18. Solid Waste Disposal Act, 42 U.S.C. § 6971;
19. Superfund, 42 U.S.C. § 9610;
20. Surface Mining Control and Reclamation Act; 29 U.S.C. § 1293;
21. Surface Transportation Act, 49 U.S.C. § 2305;
22. Toxic Substance Control Act, 15 U.S.C. § 2622;
23. U.S. Constitution, Amendments 1 and 14;
24. Water Pollution Control Act, 33 U.S.C. § 1367.

3. The seven "environmental" statutes are the Toxic Substances Control Act, Superfund, Water Pollution Control Act, Solid Waste Disposal Act, Clean Air Act, Atomic Energy and Energy Reorganization Act, and the Safe Drinking Water Act. The following statutes contain provisions which protect whistleblowers who disclose violations pertaining to various aspects of labor relations: the Fair Labor Standards Act; the National Labor Relations Act; the Civil Service Reform Act; the Longshoreman's and Harbor Worker's Compensation Act; the Surface Mining Control and Reclamation Act; the Migrant and Seasonal

Occupational Safety and Health Act must file his suit under the whistleblowing provision found in that Act.[4] Similarly, an employee who is discharged for disclosing a violation of the Fair Labor Standards Act must bring his whistleblowing claim under the relevant provisions of the FLSA.[5]

Despite individualized procedural frameworks for filing and administering whistleblower claims, the federal whistleblowing provisions all follow a similar model and contain similar language.[6] In general, employers are prohibited from discharging or in any manner discriminating against an employee simply because the employee has filed a complaint, instituted a proceeding, or testified in any proceeding or investigation under or related to the relevant statute. Most federal statutes do not define or provide specific examples of the kind of conduct that constitutes discrimination, but demotions, transfers, or any action that creates a hostile working environment for an employee could be construed as discrimination. Some federal statutes are more specific, and make it a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, or discharge a whistleblower.[7]

Agricultural Workers Protection Act; the Employee Retirement Income Security Act; and the Job Training Partnership Act. The following statutes protect whistleblowers who report workplace health and safety violations: Occupational Safety and Health Act ("OSHA"); Surface Transportation Assistance Act; Federal Mine Safety and Health Act; and the Safe Containers for International Cargo Act. Finally, the Civil Rights Act of 1871, Title VII, the Age Discrimination and Employment Act, and the First and Fourteenth Amendments to the Constitution protect employees who report acts of discrimination by their employers.

4. 29 U.S.C. § 660(c). *See also* 29 C.F.R. § 1977.3 (1990).

5. *See* 29 U.S.C. § 215(a)(3).

6. The exceptions to the general federal model tend to involve distinct subclasses of employees with a closer relationship to the federal government. For example, the whistleblower protection provisions found in the Civil Service Reform Act, which only protects employees of the federal civil service, differ from the provisions found in other federal statutes. The administrative procedures for reviewing a claim are much more elaborate than other statutes and the burden of proof is lower. The whistleblower need only show that his reporting of an alleged misconduct contributed to the employer's retaliatory action. In addition, the Civil Service Reform Act protects whistleblowers who disclose evidence of all types of misconduct in the federal system, including mismanagement, a gross waste of funds, an abuse of authority, or a specific danger to public health or safety. 5 U.S.C. § 2302(8).

The protections afforded whistleblowers under the Constitution and the Civil Rights Act of 1871 also differ from the general federal model. The class of individuals that may bring a suit under the Civil Rights Act is limited because the whistleblower must show state action. Because the First and Fourteenth Amendments only prohibit federal, state and local governments from retaliating against employees who blow the whistle, whistleblowers in the private sector are likely to be precluded from bringing a constitutional claim in response to retaliatory actions taken by their employers.

7. *See, e.g.*, Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1855(a).

The statute of limitations under the federal statutes, which is the period during which a whistleblower may bring a suit, varies from thirty days to one year.[8] Most federal whistleblower provisions, however, require administrative review of an initial filing before an action can be filed in federal court.[9] Both the employee and/or employer can usually appeal a decision of an administrative panel or judge to the United States Court of Appeals.[10]

The federal whistleblowing provisions authorize various measures of damages, typically including at least reinstatement and back pay or liquidated or compensatory damages. Some statutes provide for attorney fees[11] and/or costs and expenses,[12] and a few statutes allow exemplary damages[13] or civil fines.[14]

Other Federal Protections for Whistleblowers

Colleges and universities, particularly research universities, should also know that the federal regulations governing the Office of Scientific Integrity allow the Office to sanction retaliation of any kind against a person who reported or provided information about suspected or alleged research fraud or misconduct.[15] Thus, a university may risk its federal research funding if the institution retaliates against a person who blew

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8. Provisions of the environmental statutes, the Surface Mining Control and Reclamation Act, the Occupational Safety and Health Act ("OSHA"), and the Age Discrimination and Employment Act ("ADEA") require a complaint to be filed within thirty days of the alleged discriminatory reprisal. The Federal Mine Safety and Health Act and the Safe Containers for International Cargo Act have a sixty-day statute of limitations. Under the Migrant and Seasonal Agricultural Workers Protection Act and the Surface Transportation Assistance Act, an employee must file a complaint within 180 days after the employee first learns of the discrimination. The Job Training Partnership Act has a one-year statute of limitations.

9. There are, however, exceptions to this rule. A complaint based on the Employee Retirement Income Security Act, 29 U.S.C. § 1140, may be filed directly in a federal district court. The Department of Labor's regulations implementing the Job Training Partnership Act requires an employee to initially utilize the internal grievance procedures maintained by its employer. See 20 C.F.R. § 636.3 (1990).

10. *See, e.g.*, 29 C.F.R. § 24.4 (1990).

11. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 215(a)(3); Surface Mining Control and Reclamation Act, 29 U.S.C. § 1293; and Surface Transportation Assistance Act, 49 U.S.C. § 2305(a).

12. *See, e.g.*, Federal Mine Safety and Health Act, 30 U.S.C. § 815(c).

13. *See* Toxic Substances Control Act, 15 U.S.C. § 2622; and Safe Drinking Water Act, 42 U.S.C. § 300-j-9.

14. *See* Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. § 948a, 20 C.F.R. 8702.271 (1990).

15. 45 C.F.R. Part 689.1 (56 F.R. 22,287, May 14, 1991). The OSI regulations are currently under review.

the whistle on "scientific and engineering misconduct." The litany of conduct which is covered by "scientific and engineering misconduct" includes fabrication and falsification of data, plagiarism, and "other serious deviations" from accepted scientific practices.[16]

Finally, although the federal False Claims Act does not have a whistleblower provision akin to those discussed above, the Act does contain the qui tam provision. The False Claims Act imposes civil liability on persons who or institutions which present the federal government with false claims for payment which otherwise defraud the federal treasury.[17] The qui tam provision allows a private citizen, who, himself, has no interest in the controversy, to commence a proceeding in the government's behalf and recover damages and/or enforce penalties available under the Act. Although the qui tam provision has been in the False Claims Act since 1863, Congress amended the Act in 1986 to make it easier and more profitable for whistleblowers to file suit as qui tam plaintiffs. The 1986 amendments relaxed the existing requirements barring qui tam plaintiffs from pursuing actions based on information the government already knew, clarified the burden of persuasion as "preponderance of the evidence," dropped any requirement of specific intent to defraud, and increased the amount of damages and penalties a qui tam plaintiff could recover, as well as the plaintiff's minimum and maximum share of this recovery.[18]

The qui tam provision thus provides a substantial financial incentive to whistleblowers to go public with allegations about institutional misconduct affecting any program funded by the federal government. Because qui tam suits against universities can be very rewarding for a plaintiff-whistleblower, such persons will litigate the matter aggressively. For example, Paul Biddle, the Office of Naval Research resident representative at Stanford University who blew the whistle on Stanford's indirect cost practices, has filed a qui tam suit against the university. Although the

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16. 45 C.F.R. Part 689.1. The open-ended "other serious deviations" category of misconduct is the center of dispute in the current rulemaking proceeding.

17. *See* 31 U.S.C. § 3729, § 3730.

18. *See* Caminker, "The Constitutionality of Qui Tam Actions," 99 *Yale L.J.* 341, 341-44 (1989).

suite is still under seal while the Department of Justice investigates whether it will pursue the matter. Stanford officials speculate that the suit alleges that Stanford may owe the government as much as $200 million for overbilling the government for reimbursements of indirect costs over the past ten years.[19] If these claims are true, Biddle's reward for bringing the lawsuit could conceivably top $150 million.[20]

State Whistleblower Statutes

At least thirty states have enacted statutes which protect employee whistleblowers.[21] Although these statutes vary, each (1) defines which employees are protected; (2) establishes procedures a whistleblowing employee must follow when reporting suspected employer misconduct; and (3) describes employer conduct which may result in liability to a whistleblowing employee, the type of information or activity the employee may disclose, how certain the employee must be of the employer's misconduct, and, less frequently, who bears the burden of proof. In addition, the statutes typically limit available damages. The major provisions of state whistleblowing statutes are described below. However, each college or university must review the specific statute applicable to its jurisdiction.

Persons Protected by State Whistleblower Statutes

In nine states, the definition of "employee" under the whistleblowing statute is very broad and includes any individual who performs services for any employer, public or private, for wages or other remuneration.[22] By contrast, twenty-one

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19. *See* "Biddle Sues," *Stanford Observer*, Sept.-Oct. 1991 at 22.

20. Biddle's actual recovery, if any, will likely be substantially smaller. However, in certain circumstances, the False Claims Act authorizes a civil penalty of up to three times the amount of damage sustained by the government. *See* 32 U.S.C. § 3729(a). A qui tam plaintiff could, at maximum, recover 25 percent of the proceeds of the action if he has substantially contributed to the prosecution of the action. *See* 31 U.S.C. § 3730(d). (In the Stanford case, $200 million multiplied by three is $600 million; 25 percent of this is $150 million.)

21. The courts in some states have also adopted exceptions to the at-will-employee rule to provide relief for whistleblowers. *See* Part III.

22. The following states protect both public and private sector employees: Cal. Lab. Code Ann. § 1102.5 (West Supp. 1989) and Cal. Gov't Code §§ 10540-10551 (West 1980); Conn. Gen. Stat. Ann. § 31-51M (West Supp. 1988); Me. Rev. Stat. Ann. tit. 26, §§ 831-840 (1988); Minn. Stat. Ann. §§ 181.931-.935 (West Supp. 1989); Mont. Code Ann.

states have adopted whistleblower statutes which protect only public sector (e.g. state) employees.[23] These states define "public sector employees" in several ways. Some protect only officers or employees of the state or any of the states' departments, commissions, agencies, bodies, boards or counties.[24] Others include any employee of an organization, corporation, or an agency supported in whole or in part by public funds.[25] Employees of educational institutions may fall within the class of protected public sector employees if the school is supported by government funds in any manner. In addition, some states include employees of quasi-governmental bodies of the state in the definition of "public sector employee," and some states specifically include employees of public schools, community colleges, and state universities.[26]

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§§ 39-2-901 (1990); N.J. Stat. Ann. §§ 34:19-1 to -8 (West 1988); N.Y. Lab. Law § 740 (McKinney 1988) and N.Y. Civ. Ser. Law § 75-b (McKinney Supp. 1989). Louisiana protects employees in the private and public sector but only for reports of possible environmental violations. *See* La. Rev. Stat. Ann. § 30:2027 (West 1989).

23. The following states protect public-sector employees from discharge in retaliation for reporting their employer's unlawful conduct: 1. Ariz. Rev. Stat. Ann. §§ 38-531 to -532 (1985); 2. Colo. Rev. Stat. §§ 24-50.5-101 to -107 (1988); 3. Del. Code Ann. tit. 29, § 5115 (1983); 4. Fla. Stat. Ann. § 112.3187 (West Supp. 1989); 5. Ill. Rev. Stat. ch. 127, ¶63b119c.1 (Smith Hurd Supp. 1988); 6. Ind. Code Ann. § 4-15-10-4 (Burns 1986 & Supp. 1988); 7. Iowa Code Ann. §§ 79.28-.29 (West Supp. 1988); 8. Kan. Stat. Ann. § 75-2973 (1984); 9. Ky. Rev. Stat. Ann §§ 61.101-.103 (Michie 1986); 10. Md. Ann. Code art. 64A. §§ 12G-12J (1988); 11. N.D. Cent. Code § 34-11.1-04 (Supp. 1987); 12. Okla. Stat. Ann. tit. 74, §§ 841.7—.9 (West 1987); 13. Or. Rev. Stat. § 240.316(5) (1986); Pa. Stat. Ann. tit. 43, §§ 1421-28 (Purdon Supp. 1988) 15. R.I. Gen. Laws. §§ 36-15-1 to -10 (1988); 16. S.C. Code Ann. §§ 8-27-10 to -50 (Law Co-op Supp. 1988); 17. Tenn. Code Ann. §§ 8-50-601 to -604 (1988) ("Public Employee Political Freedom Act"); 18. Tex. Rev. Civ. Stat. Ann. § 6252-16a (Vernon Supp. 1989); 19. Utah Code Ann. §§ 67-21-1 to -9 (1986); 20. Wash. Rev. Code Ann. §§ 42.40.010-.900 (Supp. 1989); 21. Wis. Stat. Ann. §§ 230.80-.89 (West 1987).

24. *See*, e.g., Ariz. Rev. Stat. Ann. § 38-531 (1985); Was. Rev. Code Ann. § 42.40.020 (Supp. 1989); Cal. Gov't Code § 10542 (West 1980) ("employee" means any individual appointed by the Governor or employed or holding office in a state department or agency.); Del. Code Ann. tit. 29, § 5115(a) (1983); Ind. Code Ann. § 4-15-10-1 (Burns 1986 & Supp.) ("employee" means any employee of any state administration, agency, authority, board, bureau, commission, committee . . . or other similar body of state government but does not include elected officials or employees of state colleges and universities.); Ky. Rev. Stat. Ann. § 61.101 (Michie 1986); Utah Code Ann. § 67-21-2 (1986) (employee includes any person who performs a service for wages or other remuneration for a state agency or political subdivision of the state.).

25. *See* S.C. Code Ann. § 8-27-10 (Law Co-op Supp. 1988); R.I. Gen. Laws § 36-15-2(1) (1988) (employee includes any person employed by any corporation, partnership, association, sole proprietorship, or business entity which received more than two hundred thousand dollars ($200,000) in the preceding twelve (12) month period in funds from state or municipal government for the operation of its programs or as compensation for goods or services provided to the government or to a third party beneficiary or beneficiaries); Fla. Stat. Ann. § 112.3187 (3)(b) (West Supp. 1989); Pa. Stat. Ann. tit. 43, § 1422 (Purdon Supp. 1988).

26. *See, e.g.*, Fla. Stat. Ann. § 112.3187(3)(a) (West Supp. 1989); Ariz. Rev. Stat. Ann. § 38-531 (1985).

Conduct Prohibited by State Whistleblower Statutes

States that have passed statutes to protect whistleblowers typically prohibit almost any discrimination or retaliation against an employee who has reported illegal activities allegedly committed by his employer. Such retaliatory action would include discharging, threatening or otherwise discriminating against an employee by affecting the employee's compensation, terms, condition, location or privileges of employment.[27]

Procedures an Employee Must Follow to Invoke the Protection of State Whistleblower Statutes

Most state whistleblowing provisions specify the individual or entity to whom an employee must report suspected employer misconduct. In some states, the whistleblower can report misconduct either directly to a public governmental body or to the employer.[28] Other states require the employee to report any suspected violation to a supervisor first, and allow the employer a reasonable time for correction before "blowing the whistle" to a public regulatory or governmental entity.[29] Still other states only protect an employee from retaliation if

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27. *See, e.g.*, Cal. Lab. Code Ann. § 1102.5 (West Supp. 1989) (retaliate); Conn. Gen. Stat. Ann. § 31-51M (West Supp. 1988) (discharge, threaten, or otherwise penalized); La. Rev. Stat. Ann. § 30:2027 (West 1989) (act in a retaliatory manner, including "firing, layoff, lockout, loss of promotion, loss of raise, loss of present position, loss of job duties or responsibilities, imposition of onerous duties or responsibilities); Me. Rev. Stat. Ann. tit. 26, § 833 (1988); Mich. Stat. Ann. § 15.362 (1988); Minn. Stat. Ann. § 191.932 (West Supp. 1989) (discharge, discipline, threaten, otherwise discriminate against, or penalize an employee); N.J. Stat. Ann. § 34:19-2 (West 1988) (discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment); N.Y. Lab. Law § 740 (McKinney 1988).

28. *See, e.g.*, La. Rev. Stat. Ann. § 30:2027 (West 1989); Me. Rev. Stat. Ann. tit 26, § 833 (1988) (employer or public body); Minn. Stat. Ann. § 181.932 (West Supp. 1989); Mont. Code Ann. § 39-2-904 (1990); N.J. Stat. Ann. § 34:19-3 (West 1988); Pa. Stat. Ann. tit. 43, § 1423 (Purdon Supp. 1988) (to a supervisor, agent of the employer, or to an appropriate authority). "Public body" has been defined to include: "(1) the United States Congress, and State legislature, or any popularly-elected local governmental body, or any member or employee thereof; (2) any federal State, or local judiciary, or any member or employee thereof, or any grand or petit jury; (3) any federal, State, or local regulatory, administrative, or public agency or authority, or instrumentality thereof; (4) any federal, State, or local department of an executive branch of government, or (6) any division, board, bureau, office, committee or commission of any of the public bodies described in the above paragraph of this subsection." *See* N.J. Stat. Ann. § 34:19-2 (West 1988).

29. For example, Section 39-2-911 of the code of Montana provides that "the employee's failure to exhaust available internal procedures is a defense to an action brought under this act." Section 67-21-3 of Utah's code establishes an exception to a claim filed by the employee if that employee has failed to inform the employer of the violation or after giving notice, allow the employer sufficient time to take the appropriate

he reports the alleged wrongdoing to a public body or law enforcement agency.[30]

Most states also require an employee who seeks the protection of a whistleblower statute to have actually reported his employer's violation to the appropriate authority. A few states protect an employee who "intended" to disclose a violation, or was "about to disclose" a violation, or who "threatened" to disclose a violation.[31] In these states, the burden is usually on the employee to show that he was, in fact, about to disclose a violation, although the standard of proof varies from "clear and convincing evidence" to "preponderance of the evidence."[32]

Finally, the statute of limitations under state whistleblower statutes varies from ten days to three years.[33]

Employee Actions Protected by State Whistleblower Statutes

State whistleblowing statutes do not protect every employee disclosure or whistleblowing activity. Nearly all of the statutes, however, protect employees who report violations or sus-

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steps. *See, also,* Me. Rev. Stat. Ann. tit. 26, § 833 (1988); N.J. Stat. Ann. § 34:19-4 (West 1988); N.Y. Lab. Law § 740 (McKinney 1988); Ind. Code Ann. § 4-15-1—4 (Burns 1986 & Supp.); Utah Code Ann. § 67-21-3 (1986). Under these statutes, however, prior notice to an employer is not required if the employee has specific reason to believe that reports to the employer will not result in prompt correction of the violation, condition or practice. *See* Me. Rev. Stat. Ann. tit. 26, § 833 (1988). Kansas and Kentucky, by contrast, expressly provide that a public-sector employee has no duty to inform his or her superiors for any wrongdoing before blowing the whistle. *See* Kan. Stat. Ann. § 75-2973(2) (1984); Ky. Rev. Stat. Ann. § 61.102(1) (Michie 1986).

30. *See, e.g.*, Cal. Lab. Code Ann. § 1102.5 (West Supp. 1989) (no employer shall retaliate against an employee for disclosing information to a government or law enforcement agency); Conn. Gen. Stat. Ann. § 31-51m (West Supp. 1988) (to a public body); Del. Code ann. tit. 29, § 5115 (1983) (Office of Auditor of Accounts); Fla. Stat. Ann. § 112.3187 (West Supp. 1989) (to any appropriate agency or federal government entity); Iowa Code Ann. § 79.28 (West Supp. 1988); Ky. Rev. Stat. Ann. § 61.102 (Michie 1986); R.I. Gen. Laws § 36-15-3 (1988); Tenn. Code Ann. §8-50-603 (1988); Wash. Rev. Code Ann. §42.40.030 (Supp. 1989).

31. *See* Mich. Stat. Ann. § 15.362 (Callaghan 1982 & Supp.) (reports or is about to report); N.J. Stat. Ann. § 34:19-3 (West 1988) (discloses or threatens to disclose); N.Y. Lab. Law § 740 (McKinney 1988) (discloses, or threatens to disclose); Pa. Stat. Ann. tit 43, § 1423 (Purdon Supp. 1988) (reports or is about to report); Okla. Stat. Ann. tit. 74, § 841.7 (West 1987) (providing or offering to provide information); R.I. Gen. Laws 36-15-3 (1988) (reports or is about to report).

32. *See* R.I. Gen. Laws § 36-15-4 (1988); Ky. Rev. Stat. Ann. § 61.103(2) (Michie 1986); Utah Code Ann. § 67-21-4(4) (1986); Pa. Stat. Ann. tit. 43, § 1424 (Purdon Supp. 1988).

33. For example, in Arizona a claim must be filed within ten days of the prohibited action, while Wisconsin allows a suit to be filed within sixty days. Connecticut, Michigan, Delaware, Florida, Kentucky and Utah all have a 90-day statute of limitations, and Pennsylvania and Utah impose a 180-day statute of limitations. South Carolina allows a suit to be filed within two years, and Colorado and Rhode Island have a three-year statute of limitations.

pected violations of a state or federal statute or who report violations or noncompliance with state or federal regulations.[34] Many states also protect employees who report any conditions or practices that cause a risk to any employee or to the general public.[35] The statutes which protect only public sector employees often allow the whistleblower to report situations involving gross waste or abuse.[36]

In addition to reporting or disclosing violations or suspected violations of law or governmental waste, many state statutes prohibit an employer from retaliating against an employee who testifies or otherwise participates in any investigation or inquiry into potential employer misconduct.[37]

A limited number of state statutes also protect an employee who refuses to obey an employer's order which the employee believes violates any law or public policy. Minnesota's statute, for example, provides that an employer shall not discharge [or] threaten...an employee...because "the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason."[38] Montana's whistleblower statute provides that a discharge is wrongful if "it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy."[39]

Colleges or universities should consult the specific whistleblower statutes applicable in their states. In some states the information or activity protected by whistleblower statutes is very limited. For example, Louisiana's whistleblowing statute applies only if the employee reports or complains about possible environmental

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34. *See, e.g.*, Cal. Lab. Code § 1102.5 (West Supp. 1989); Conn. Gen. Stat. Ann. § 31-51M (West Supp. 1988) (violation or suspected violation); Mich. Stat. Ann. § 15.362 (Callaghan 1982 & Supp.) (violation or suspected violation).

35. *See, e.g.*, Me. Rev. Stat. Ann. tit. 26, § 833 (1988).

36. *See, e.g.*, Ariz. Rev. Stat. Ann. § 38-532 (1985); Cal. Gov't Code § 10542 (West 1980); Ill. Rev. Stat. ch. 127, ¶ 63b119c.1 (Smith Hurd Supp. 1988); Ind. Code Ann. § 4-15-10-4 (Burns 1986 & Supp. 1988); Iowa Code Ann. § 79.28 (West Supp. 1988).

37. *See, e.g.*, N.J. Stat. Ann. § 34:19-3 (West 1988); Conn. Gen. Stat. Ann. § 31-51M (West Supp. 1988); Me. Rev. Stat. Ann. tit. 26, § 833 (1988); Mich. Stat. Ann. § 15.362 (Callaghan 1982 & Supp.); Minn. Stat. Ann. § 181.932 (West Supp. 1989).

38. Minn. Stat. Ann. § 181.932 (West 1988).

39. Mont. Code Ann. § 39-2-904. *See also*, N.J. Stat. Ann. § 34:19-3 (West 1988).

violations.[40] In New York, the whistleblowing statute only covers employees who provide information concerning an activity, policy, or practice of the employer that violates a law, rule or regulation and which "creates and presents a substantial and specific danger to the public health or safety."[41]

How Certain an Employee Must Be About Suspected Employer Misconduct Before He Invokes the Protection of a State Whistleblower Statute

Most states do not require the whistleblower to be absolutely certain that his employer has actually violated a law, rule or regulation before protecting the employee under the state whistleblower statute. State statutes typically protect an employee who reports a "suspected" violation. However, in most states the employee has the burden of showing that he had a "reasonable belief" or "reasonable cause to believe" that the information would disclose a violation of a state or federal statute or regulation.[42] Other states require the employee to show only that he was acting in "good faith."[43] In yet another variation, some states do not require the employee to show that he was acting in "good faith" or had a "reasonable belief," but instead place the burden on the employer to show that the employee knew that his report was false.[44]

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40. *See* La. Rev. Stat. Ann. § 30:2027 (West 1989).

41. *See* N.Y. Lab. Law § 740 (McKinney 1988); N.Y. Civ. Ser. Law § 75-b (McKinney Supp. 1989).

42. *See, e.g.*, Cal. Lab Code Ann. § 1102.5 (West Supp. 1989); N.J. Stat. Ann. § 34-19-3 (West 1988) ("reasonably believes"); Ariz. Rev. Stat. Ann. § 38-532 (1985); Ill. Rev. Stat. ch. 127, ¶63b119c.1 (Smith Hurd Supp. 1988); Iowa Code Ann. § 79.28 (West Supp. 1988); R.I. Gen. Laws § 36-15-3 (1988) (a violation which . . . the employee knows or reasonably believes has occurred or is about to occur.")

43. *See, e.g.*, Me. Rev. Stat. Ann. tit. 26, § 833 (1988); Minn. Stat. Ann. § 181.932 (West Supp. 1989); La. Rev. Stat. Ann. § 30:2027 (West 1989); Ky. Rev. Stat. Ann. § 61.102 (Michie 1986); Pa. Stat. Ann. tit. 43, § 1423 (Purdon Supp. 1988).

44. *See, e.g.*, Conn. Gen. Stat. Ann. § 31-51M (West Supp. 1988) (the provisions of this subsection shall not be applicable when the employee knows that such report is false); Mich. Stat. Ann. § 15.362 (Callaghan 1982 & Supp.) (unless the employer knows that the report is false); Colo. Rev. Stat. § 24-50.5-103 (1988) (the protection of this section shall not apply to an employee who discloses information that he knows to be false or who discloses information with disregard for the truth or falsity thereof); Del. Code Ann. tit. 29, § 5115 (1983) (the provisions of this section will not apply to an employee who reports information which he knows is false). In most cases, the statutes do not expressly provide that the employer bears the burden of providing falsity. However, since this may prove to be a defense, it is assumed that the employer would bear the burden on this issue. For a more detailed discussion of each parties' respective burden of proof see *infra*, p. 14.

The Burden of Proof and Employer Defenses Under State Whistleblower Statutes

A few state statutes specify explicitly which party bears the burden of proof, i.e., which party must prove his case.[45] The language of most statutes, however, does not allocate the burden of proving particular aspects of a case to either party. Nevertheless, case law interpreting certain of the statutes suggests the following analysis.

To establish a prima facie case of retaliation, an employee must show that: (1) he was engaged in a protected activity as defined by the relevant statute; (2) he was subsequently discharged or otherwise discriminated against; and (3) there was a causal connection between the protected activity and the employer's action.[46] Once the employee demonstrates that his discharge (or any other discriminatory action taken against him) was motivated by his whistleblowing activities, the burden of production shifts to the employer to then articulate a different reason for its action.[47] If the employer can articulate a legitimate non-retaliatory reason for its action, the burden again shifts back to the employee.[48] Throughout the proceeding, the burden of persuasion remains with the employee to prove that he was retaliated against unlawfully, as defined by the relevant state statute.[49] In most states, the employee will prevail if he can demonstrate by a preponderance of the evidence that the employer's reason for discharge or discrimination was a mere pretext for retaliation.[50]

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45. *See, e.g.*, Utah Code Ann. § 67-21-4 (1986); Pa. Stat. Ann. tit. 43, § 1424 (Purdon Supp. 1988); S.C. Code Ann. § 8-27-30(B) (Law Co-op Supp. 1988).

46. *See Wolcott v. Champion Intern. Corp.*, 691 F.Supp. 1052 (W.D.Mich. 1987).

47. *See Phipps v. Clark Oil Refinery Corp.*, 408 N.W.2d 569 (1987) (employee's demonstration that discharge may have been motivated by good-faith refusal to violate law shifts burden of production to employer to articulate another reason for the discharge, but employee must prove by preponderance of the evidence that discharge was for impermissible reasons.)

48. *See Wolcott v. Champion Intern. Corp.*, 691 F.Supp 1052 (W.D. Mich. 1987); *Melchi v. Burns Intern. Sec. Services, Inc.*, 597 F.Supp. 575 (Mich. 1984)

49. *See Melchi v. Burns Intern. Sec. Services*, 597 F.Supp. 575 (Mich. 1984). In Colorado, however, the burden of persuasion shifts to the employer. Under the provisions of Colorado's whistleblower statute, once the employee establishes that his disclosures fell within the protections of the act and that they were a substantial or motivating factor in the employer's decision, the employer must establish by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. *See Ward v. Industrial Com'n*, 699 P.2d 960 (Colo. 1985).

50. *See, e.g.*, Pa. Stat. Ann. tit. 43, § 1424 (Purdon Supp. 1988) (it is a defense to an action under this section if the defendant proves by a

A majority of states also allow the employer to question the whistleblower's motives or knowledge. In fact, many state whistleblowing statutes provide an exemption if the employer can establish that the employee-whistleblower knowingly made a false accusation or knowingly filed an action that was without basis in law or fact.[51] Indeed, in such situations at least one state authorizes a fine against the complaining employee and permits the employer to dismiss the employee.[52] Moreover, in many states an employer may be entitled to an award of reasonable attorneys' fees if it can establish that the employee's claims were without basis in law or fact.[53]

Damages Available Under State Whistleblower Statutes

State whistleblower statutes authorize various measures of damages. If a court finds an employer liable under a whistleblower statute, most states require the employer to (1) reinstate the employee to his previous job; (2) pay appropriate back wages; and (3) reestablish the employee's benefits.[54] Some states allow the whistleblower the opportunity to recover attorneys' fees and costs, and a very limited number of states authorize an award of punitive damages in certain circumstances.[55] Most states, however, will not award damages for emotional distress or for pain and suffering.[56] Finally, some states assess a civil fine against an employer who violates the whistleblowing statute.[57]

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preponderance of the evidence that the action by the employer occurred for separate and legitimate reasons, which are not merely pretextual); *Phillips v. Clark Oil & Refinery Corp.*, 408 N.W.2d 569 (1987) (Minnesota requires the employee to prove its case by a preponderance of the evidence).

51. *See, e.g.*, Conn. Gen. Stat. Ann. § 31-51M(b) (West Supp. 1988); Me. Rev. Stat. Ann. tit. 26, § 833 (1988); Minn. Stat. Ann. § 181.932 (West Supp. 1989); Ariz. Rev. Stat. Ann. § 38-532 (1985).

52. *See* Ariz. Rev. Stat. § 38-532(M)(1985).

53. *See, e.g.*, N.Y. Lab. Law § 740 (McKinney 1988); N.J. Stat. Ann. § 34:19-6 (West 1988).

54. *See, e.g.*, Conn. Gen. Stat. Ann. § 31-51M (West Supp. 1988); Mich. Stat. Ann. § 15.364 (Callaghan 1982 supp.); Mont. Code Ann. § 39-2-905 (1990) (an employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest).

55. *See* N.J. Stat. Ann. § 34:19-5 (West 1988); Mont. Code Ann. 39-2-905(2)(1990); Tenn. Code. Ann. § 8-50-603(1988).

56. *See* Mont. Code Ann. § 39-2-910 (1990). Section 2027 of the code of Louisiana, however, provides for damages for physical or emotional damages resulting from the employer's unlawful actions.

57. *See* Mich. Stat. Ann. § 15.365 (Callaghan 1982 & Supp); New Jersey Stat. Ann. § 34:19-5(g) (West 1988); Ariz. Rev. Stat. Ann. § 38-532

State Common Law Actions For Wrongful Discharge

In addition to the specific statutory remedies discussed above, developments in the common law of many states may also protect a whistleblower from retaliatory discharge or discrimination. The doctrine of employment-at-will, which holds that a non-contractual employee can be dismissed without cause, is still valid in all states. However, many states now limit the doctrine's application where an employee is penalized for exercising a right protected by public policy or is terminated in a manner that violates public policy. At least 38 states have adopted a public policy exception to the doctrine of employment-at-will, although many have done so in a limited fashion.[58]

While courts generally disagree on what constitutes a "public policy" sufficiently important to merit an exception to the doctrine of employment-at-will, most at least recognize that retaliation for legitimate whistleblowing activities justifies such an exception.[59] College and university administrators should study the applicable case law in their jurisdictions to determine whether an employee who alleges retaliatory

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(1985); Pa. Stat. Ann. tit. 43, § 1426 (Purdon Supp. 1988); Utah Code Ann. § 67-21-6 (1986). In addition both Maine and Minnesota impose a fine on an employer of $10 and $25 a day respectively for failure to post a notice informing employees of their rights under the relevant statutes. *See* Me. Rev. Stat. Ann. tit. 26 § 836 (1988); Minn. Stat. Ann. § 181.935 (West Supp. 1989).

58. At least the following states recognize some version of the public policy exception to employment-at-will: Alaska; Arkansas; Arizona; California; Colorado; Connecticut; Hawaii; Idaho; Indiana; Iowa; Kentucky; Massachusetts; Maine; Michigan; Nevada; New Hampshire; New Jersey; New Mexico; North Carolina; Ohio; Oklahoma; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; Washington; Wisconsin; West Virginia; and Wyoming.

Some states construe or permit the exception only in limited situations. *See, e.g.*, Alabama (workers compensation, refusal to take polygraph), Kansas (polygraph); Maryland (polygraph); Nebraska (polygraph); North Dakota (workers compensation); Oregon (jury duty); Pennsylvania (jury duty). In Mississippi, however, no cause of action is stated if an employee is terminated for filing a workers' compensation claim.

See Note, "The Employee Health and Safety Whistleblower Act and the Conscientious Employee: The Potential for Federal Statutory Enforcement of the Public Policy Exception to Employment at Will," 59 *Cincinnati L. Rev.* 513, 517-519 n. 21, 26 (1990) for case cites in each jurisdiction.

59. *See, e.g., Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (1988) (allowing an employee fired after reporting a physician for Medicaid fraud to assert a wrongful discharge claim); *Cerracchio v. Leeds, Inc.*, 223 N.J. Super. 435, 538 A.2d 1292 (1988) (allowing an employee to pursue an action for retaliatory discharge because he was fired as the result of filing an OSHA complaint); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (allowing an employee to claim retaliatory discharge because he was terminated after encouraging and cooperating with a police investigation of his employer); *Harless v. First National Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 270

termination can assert a common law claim, in addition to any state or federal statutory claims.[60]

If both statutory and common law claims are available, an employee may prefer the latter because he may be able to avoid administrative and procedural restrictions imposed by statute.[61] In addition, common law claims are often based on tort principles, thus creating the possibility of punitive damages.[62] However, many states with whistleblower statutes could eventually hold that the statute preempts state common law claims based on the public policy exception to the doc-

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(1978) (holding that an employee discharged for reporting violations of state and federal consumer credit laws to superiors stated a claim for wrongful discharge); *Sheets v. Teddy's Frozen Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (holding that an employee who was discharged for urging his employer to comply with the state Uniform Food, Drug & Cosmetic Acts stated a claim for wrongful discharge); *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) (holding that employee stated a claim for wrongful discharge because he was terminated after reporting the sale of adulterated milk); *Hicks v. Clyde Federal Savings & Loan Ass'n*, 722 F. Supp. 501 (N.D. Ill. 1989) (holding that employee stated a wrongful discharge claim because he was fired for voicing objections to his employer's violation of the Community Reinvestment Act); and *Field v. Philadelphia Electric Co.*, 388 Pa. Super. 400, 565 A.2d 1170 (1989) (allowing a claim for wrongful discharge where employee was terminated for reporting violations to the Nuclear Regulatory Commission).

But *see, e.g.*, Kaynard, Kelly & McLanahan, *Workplace Claims*, 119th Annual Institute for Employment Law 91, 191-92 (PLI 1990) (stating that most courts refuse to recognize a public policy exception where an employee was terminated for complaining to superiors about activities and conduct that employee viewed as illegal or unethical, because such *internal* complaints do not implicate "public" policy); *Gil v. Metal Services Corp.*, 412 So. 2d 706 (La. App. 1982) (holding that an employee discharged for protesting his employer's violation of consumer protection laws did not state a claim for wrongful discharge); *McGonagle v. Union Fidelity Corp.*, 383 Pa. Super. 223, 556 A.2d 878 (1989) (holding that the public policy exception did not encompass the claim of a Vice President/General Counsel discharged for refusing to approve certain mailings he believed violated the insurance laws); *Wittsie v. Baby Grand Corp.*, 774 P.2d 432 (Nev. 1989) (holding that employee terminated for reporting supervisor's illegal activity to company officials did not state a claim for wrongful discharge); *Littman v. Firestone Tire & Rubber Co.*, 715 F. Supp. 90 (S.D.N.Y. 1989) (disallowing a claim for wrongful discharge, under New Jersey law, to an employee terminated for asking management to investigate internal fraud); and *American Computer Corp. v. Superior Court*, 213 Cal. App. 3d 664, 261 Cal. Rptr. 796 (1989) (disallowing wrongful discharge claim for employee who suspected embezzlement).

60. *See* Note, "The Employee Health and Safety Whistleblower Act and the Conscientious Employee: The Potential for Federal Statutory Enforcement of the Public Policy Exception to Employment-at-Will," 59 *Cincinnati L. Rev.* 513, 522 (1990) (citing cases and cautioning any employee discharged for disclosing his employer's wrongful acts to rely on pleadings carefully tailored to the particular jurisdiction's definition of public policy).

61. *See, e.g.*, Dworkin & Near, "Whistleblowing Statutes: Are They Working?," 25 *Am. Bus. L.J.* 241, 254 (1987); McCandless & Cortez, "Employer-Employee Relations: Managing Workplace Issues in the 1990s," *Tort & Insurance Law Journal* 255, 258 (1990).

62. *See* Ross, *Trends in the Law 1989-1999*, 2 19th Annual Institute on Employment Law 7, 83 (PLI 1990) (noting that the fear of punitive damages, plus the fact that most of the exposure is not insured, drives many such cases to settle). *See also* Note, "Reversing the Presumption of Employment At Will," 44 *Vanderbilt L. Rev.* 689, 695 (1991) (noting that courts disagree on whether the public policy exception is grounded on contract or tort).

trine of employment-at-will.[63] Indeed, some whistleblowing statutes explicitly allow or disallow certain common law claims based on related whistleblowing activities.[64]

Recommended Strategies for Working with Whistleblowers

By way of introduction to the discussion of strategies for managing the complexities presented by the various legal mechanisms which protect whistleblowers, it may be useful to review the various issues in a familiar context. The following scenario is a composite of a number of real case histories.

W.B. is a postgraduate research associate employed by a prominent faculty researcher on a federally-funded grant. Her boss, Prof. X, is one of the leading lights of his department. He publishes constantly and has a flock of graduate students and post graduate assistants who depend on his grant-getting ability for their salaries and professional progress.

After a few years during which W.B. works with little advancement, she complains to her friend, Prof. Y, that she thinks Prof. X is using her work without crediting her as a coauthor. Prof. Y is sympathetic, but does nothing. Y knows that there is a very fine line between plagiarism and standard operating procedure in big time research. She also fears that any implied criticism of Prof. X will hurt her own chances for professional advancement.

Frustrated by the lack of reaction to her complaint, W.B. becomes convinced that some of the work being done for Prof. X is at best inaccurate and at worst simply false. This time, she goes

63. *See, in general,* Nucyokas, *Two Growing Procedural Defenses in Common Law Wrongful Discharge Cases—Preemption and Res Judicata,* 11 U. Haw. L. Rev. 143 (1989); Baxter & Alter, *Preemption of State Law Causes of Action: Recent Developments,* 14 Employee Rel. L.J. 407 (1988); Ross, *Trends in the Law 1989-1999,* 2 19th Annual Institute on Employment Law 7, 85 (PLI 1990); *Covell v. Spengler,* 141 Mich. App. 76, 366 N.W.2d 76 (1985).

64. Montana's whistleblowing provision explicitly forbids common law claims based on related whistleblowing activity (Mont. Code. Ann. § 39-2-913), while the Maine, New York and New Jersey whistleblowing statutes do not abrogate any common law rights of the employee (Me. Rev. Stat. Ann. tit. 26, §§ 831-840; N.Y. Lab. Law. § 740; N.J. Stat. Ann. §§ 34.19-1 to 19-8).

Some states dictate in their whistleblowing statutes whether the statutory claim preempts or preserves the rights of any person under a collective bargaining agreement. *See, e.g.* Connecticut (Conn. Gen. Stat. Ann. § 31-5m); Michigan (Mich. Stat. Ann. § 15.361-369); Minnesota (Minn. Stat. Ann. § 181-931-935); Rhode Island (R.I. Gen. Laws §§ 36-51-1-to-10); and Wisconsin (Wisc. Stat. Ann. §§ 230.80-.89).

to the chair of the department. The chair assures W.B. that he will look into the matter. In fact he does nothing—other than joke about the degree of competitiveness in the labs with his friend, the university provost. As an example, he briefly mentions W.B.'s "outrageous" suggestion that Prof. X is plagiarizing her work and tolerating sloppy research on his grants. A little less foolish than the chair, the provost writes himself a note to look into the matter, without disturbing X, of course.

After two years of steadily building frustration, W.B. talks to a friend, who tells her to write to the campus newspaper, which has a reputation for investigative journalism. W.B. makes contact and tells the students about her belief that research results are being falsified. The students are able to confirm her claims through the help of undergraduate work-study technicians.

After the story makes the front page, the provost and the general counsel's office try to prevent Prof. X from retaliating against W.B. They are able to prevent him from firing W.B., but they cannot prevent him from making his hostility blatantly apparent. W.B. proves this by playing a tape of a conversation she had with Prof. X.

Certain that her career is dead, W.B. files a law suit claiming constructive discharge and intentional infliction of mental distress. She also includes a cost recovery claim under the False Claims Act. Y is deposed, and the provost's note comes out in document production.

Avoiding Whistleblower Retaliation Claims

1. Training. The most effective strategy for avoiding whistleblower claims of retaliation is training the work force about the rights of an employee who threatens to or actually discloses a suspected violation of law. Supervisors and managers must understand and accept the basic provisions of the relevant state and federal whistleblower statutes and the outline of any public policy exception to the rule of employment-at-will which is applicable in the institution's jurisdiction. Supervisors must also understand that these are new statutes which require a dramatic change in attitudes. A court may label actions as "retaliatory" or "discriminatory" which, by the standards common before the passage of whistleblower acts, appeared benign or reasonable.

Because responding to whistleblowers is so unlike any other responsibility supervisors have dealt with in the past, simply handing out a written description of applicable "do's" and "don'ts" is unlikely to have much effect. Instead, many supervisors will need to become more responsive to employees' allegations or insinuations of suspected wrongdoing, and learn how to avoid actions that might be construed as retaliatory conduct. Colleges and universities should consider using training techniques which are likely to have a greater effect, such as video workshops and role playing seminars, especially for supervisors in areas in which whistleblowing is most likely to occur.

2. Establish Procedures to Channel Whistleblowers' Allegations. The best way a college or university can avoid entanglements with whistleblowers is to establish a credible procedure employees can use when they wish to disclose either a suspected violation of the law or an apparently improper practice. Without an established procedure, employees will not know how or to whom to report suspected misconduct, and may turn instead to persons within the institution who are not in a position to respond appropriately, such as Prof. Y or the department chair. Worse yet, the whistleblower who has no trustworthy university resources to turn to is likely to go to outside authorities, public interest groups or the press. Developing a protocol for handling employee allegations of misconduct is especially important in states that require employers to post a copy or summary of the whistleblowing statute, with the name and telephone number of the person or department employees can contact to ask questions or to report violations or unsafe conditions or practices.[65]

Although an institution has wide latitude to develop its own networks, experience suggests that the truly workable systems fall into one or two categories. Some institutions will find that a single designated individual, perhaps the university ombudsperson, if there is one, is the most useful recipient of a whistleblower's disclosure. An ombudsperson who is regarded by the university

65. Kansas, Maine, Minnesota, New Jersey, Pennsylvania, Rhode Island and Oregon require employers located in their respected jurisdictions to post such a description.

community as an effective resource would typically have both the necessary training to evaluate what the whistleblower discloses, and the perceived neutrality necessary to gain the trust of a nervous whistleblower. Using an ombudsperson as the designated individual is also advantageous because an ombudsperson has sufficient institutional credibiiity to bring serious disclosures directly to the highest offices. In addition, an ombudsperson can easily access the institutional memory of the university.

The primary reason for designating only one person to whom others can make their disclosures is that it takes tremendous skill to balance the reactions and the demands of the three participants involved in any whistleblowing allegation—a terrified but righteous whistleblower, an outraged and frightened respondent, and an anxious and confused administration. Such skill is only attained through experience, and is usually maximized when a single person handles all the whistleblowing incidents at the institution. To the extent whistleblowing allegations are handled by a full-time ombudsperson, the necessary skills and experience are likely to develop further and faster. In addition, appointing the ombudsperson to deal with whistleblowing allegations will add credibility to any whistleblowing inquiry or investigative activity.

Dividing the job among several individuals dilutes the overall effectiveness, but may be necessary because of the size of the institution, or in circumstances where full-time status is not possible or the range of substantive skills needed for the position is too broad for available talent. Because of the size and complexity of their workforce, very large universities may need to designate multiple recipients for whistleblower disclosures. However the jurisdictions of the several individuals are defined,[66] each should operate under the same procedures and should be accorded the same rights of access to the most senior officers of the institution.

Finally, an institution should probably not designate a committee as the initial recipient to

66. There are several obvious ways of drawing jurisdictional lines. One might be based upon expertise, so that there would be a designee for scientific research, another for government contracting and a third for campus security matters. Another way would be based on the institution's organizational structure. In this model, one designee would serve the faculty, another the administrative staff and a third the hourly staff.

handle employee allegations of misconduct. Almost by definition, a committee cannot develop the experience and credibility to respond to the complex issues presented by whistleblower disclosures. A committee is also likely to appear more threatening to an individual who simply wants to disclose that he believes the institution or its employees may be behaving in an improper manner. Furthermore, a committee will have more difficulty maintaining confidentiality than an individual.

3. Develop an Internal Structure and Procedure to Investigate Whistleblower's Allegations. In order to respond appropriately to a whistleblower's disclosure, institutions must develop an internal structure and procedure for conducting an inquiry into an employee's allegations of misconduct. Institutions would be well-advised to prepare guidelines for those people who will conduct the investigation in advance of any actual allegation by a whistleblower. Indeed, some federal regulations require that recipients of federal funds have such guidelines in place.[67] The guidelines should delineate clearly the investigators' responsibilities and authority. However, any guidelines must be flexible enough to easily adapt to particular situations.

The person or persons designated by the university to initially receive whistleblowing complaints should conduct a discreet preliminary investigation of the whistleblower's allegation to determine whether the allegation has any merit or whether it is completely frivolous. Any allegation puts an institution on notice of a potential problem. The initial investigator(s), therefore, should never ignore or summarily dismiss an allegation because that fact can later be used to accuse the institution of "sweeping the problem under the rug."[68]

If the initial investigator believes that an employee's allegation has merit, he should report the violation to an appropriate individual, also designated by institutional policy, and together these persons should decide whether to com-

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67. *See, e.g.*, Misconduct in Science Regulations, 45 C.F.R. Part 689 et seq.

68. Some federal funding statutes and regulations, such as OSI's scientific misconduct regulations, require an institution to "initiate an inquiry into any suspected or alleged misconduct." *See* 45 C.F.R. Part 689.3(a).

mence a full investigation.[69] These persons must be trained carefully in file discipline and accurate documentation of interviews because the first target of governmental investigators and vengeful qui tam plaintiffs will be the records made during the initial inquiry and investigation.

An institution's procedures should also include alternative provisions to handle situations in which persons who ordinarily are responsible for investigating allegations of impropriety are themselves a target of an allegation. This alternative reporting system should be available at all levels so that an employee or an investigator never has to report a suspected violation directly to those whom he suspects may have committed or knowingly tolerated the violation.

Finally, no person associated with an investigation in any manner should harbor or express a bias about the whistleblower or about the person or persons whom the whistleblower alleges has behaved improperly. The institution should excuse persons having such biases or conflicts of interest from participating in the investigation.

4. *Respect the Sensitivity of a Whistleblower's Allegations.* At all times during and after an inquiry or investigation, the university or college should strive to maintain confidentiality and to respect the privacy of both the whistleblower and any persons accused of misconduct. Nonetheless, the institution should also immediately ensure that the employee's supervisor will not take any actions which may be considered retaliatory. Where appropriate or necessary, the supervisor should be informed of the whistleblower's protected status, and directed to confer with senior management before taking any action that could be construed as retaliatory. Wherever possible, a potentially hostile supervisor should be advised in writing of the need to avoid even seeming

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69. In certain instances, the law may impose reporting requirements on universities who suspect an employee has violated the law or acted in an unethical manner. For example, guidelines published by the United States Public Health Service require that an investigation of alleged misconduct in academic research be commenced within thirty days of completion of an initial inquiry and that the investigation be completed within 120 days, unless permission for extension is granted by the relevant funding agency. *See also* Coughlin, "Proposed Rules for Misconduct Investigations by NIH Draw Complaints From Researchers," 37 *Chron. Higher Educ.* (Oct. 2, 1991) at A6 (discussing the negative reception in the academic community of the proposed Department of Health and Human Services policy on government investigations of scientific misconduct in biomedical research).

retaliation, and warned that retaliation is an independent grounds for discipline.

If the employee's allegation seriously implicates his supervisor, the institution should consider appointing an interim supervisor or assigning the employee (with the employee's consent) to an alternative job or job site until the matter is resolved. In instances where disclosure to the supervisor could jeopardize the investigation, the employee should be guaranteed that (1) any decision made by the supervisor which affects the employee will be reviewed by someone of greater authority; and (2) any such action will be reversed if improperly motivated. To protect its own freedom to act, an institution should never guarantee that it will preserve either the whistleblower's job or anonymity.

5. Educate Employees About Management's Willingness to Listen to Their Complaints and Allegations. If an institution openly encourages employee disclosure of suspected misconduct, an employee whistleblower will be less likely to feel isolated and less likely to blame the entire institution for the retaliatory actions of a particular person.[70] Informing employees, in advance, that there are remedies for retaliation is one way to keep whistleblowing allegations within the institutional system, and out of the press.

Notifying employees by posting flyers is yet another way to create an environment which encourages disclosure. In some states, it may also be a minimum requirement.[71] However, simply posting notices may not be very effective. Distributing a detailed pamphlet or text on the subject with other required annual mailings to employees could be more effective. Such a document should include, at minimum, a summary of applicable state and federal whistleblowing statutes in concise and clear language, a description of procedures for reporting violations, the telephone number of a supervisor or other individual in the campus personnel office who can answer questions, and the name of the individual or

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70. *See* Campus Security Report (September 1991) at 9.

71. Kansas, Minnesota, Rhode Island, New Jersey, Pennsylvania and Oregon require all employers to post a copy of the whistleblower act in a place where it can reasonably be expected to come to the attention of all employees. In fact, Maine and Minnesota impose a small fine for each day the employer does not post such a sign.

individuals to whom the employee should report violations or unsafe conditions or practices.

6. Keep the Whistleblower Informed About the Institution's Response to His Allegation. Colleges and universities would be well-advised to develop a mechanism to update a whistleblower on the status of any inquiry or investigation stemming from his disclosure. The whistleblower who is forgotten, or who feels he has been ignored or treated poorly by the administration, is very likely to become frustrated and suspicious. This level of distrust ultimately may drive a whistleblower to pursue more drastic measures.[72] Keeping the whistleblower up-to-date may help divert such actions, and can also help the institution better gauge whether the employee plans to go public with his charges.

One of the most difficult aspects of managing relations with a whistleblower is communicating the results of the institutional investigation. The college or university must persuade the whistleblower to agree with the result it has reached. As demonstrated by several highly publicized cases, including the case of Nobel Laureate David Baltimore, this goal is not always attainable by rational means. However, cases in which the whistleblower publicizes his disagreement with the institution's investigation of and response to his allegation are generally the result of poor initial handling of the whistleblower. Where a whistleblower understands that his allegations were treated seriously, and that the institution, having found the allegations to be true, took appropriate action in response, an institution has a better chance of persuading a whistleblower to let the matter rest.

If the inquiry or investigation of a whistleblower's allegation did not confirm any misconduct, the final meeting with the whistleblower presents an especially delicate risk management task. During the closing meeting with the whistleblower, the institution should tell the employee that (1) his complaint was taken seriously; (2) it was investi-

72. For example, one whistleblower at the University of Michigan frustrated by what she felt was the institution's lack of responsiveness to her charges hid a tape recorder in her bra and taped over 100 hours of conversations with university counsel, administrators, congressional and regulatory staffers and other authorities. The whistleblower plans to use the tapes as evidence in a wrongful discharge suit. (Michigan law allows recorded conversations in evidence as long as one party consents to the taping.)

gated thoroughly; (3) no other evidence confirmed the initial report; and (4) the investigation is closed. The institution should thank the employee for the information he supplied and invite the employee to report any further suspicions or evidence about the matter at hand or about any other matter. Finally, the institution should stress to the employee the fact that a sealed record of the employee's allegation and the subsequent investigation will be kept by the office or person who investigated the matter, but no record of the complaint or report will appear in the employee's personnel file. The institution should not treat the case as closed, however, even following a terminal meeting with the whistleblower. Additional support and tracking of a whistleblower after the close of an investigation may reduce the risk of later publication of the whistleblower's charges.

Managing a Whistleblowing Employee When a Charge of Retaliation Seems Likely To Follow

As mentioned in the Introduction, a disturbing number of whistleblower claims are being raised as peremptory defenses by otherwise difficult employees. This section considers the management of situations in which a college or university anticipates an employee or former employee will file an unfounded claim under the whistleblower statutes as a response to disciplinary measures or termination.

Most courts will not allow a whistleblower to recover damages if the employer can demonstrate that the employee was discharged or otherwise treated disadvantageously for some legitimate reason unrelated to the employee's disclosure of an illegal practice. Thus, the best strategy for managing a whistleblowing employee when an institution believes that the employee will file a retaliatory discharge or discrimination lawsuit mirrors the strategy for avoiding whistleblower claims entirely: good personnel policies and procedures. Implementing appropriate human resource policies and procedures before any claim arises will help ensure that potential claims are managed in a manner which best protects the institution in the event of a lawsuit. These preventive measures, however, do not moot or diminish the importance of making good decisions

about a whistleblowing employee once a lawsuit appears imminent. An institution should handle all events surrounding the whistleblower as if they will later be described in detail in a lawsuit or by the media.

1. Develop and Utilize a Meaningful Performance Review System. The key to a strong defense of a retaliation claim is documentation, over time, of an employee's job performance. Although an institution can structure a performance review system in a myriad of styles, such a system should involve, at minimum, (1) routine appraisals of the employee's performance in terms of jobs skills and ability to work within the institutional structure and character; and (2) face-to-face communication between the employer and the employee on the content of this appraisal.

An institution enhances its chances of defending against any suit brought by an employee alleging wrongful discharge claims by producing documentation of (1) recurring performance or social problems; (2) notice to the employee of any criticism of his performance or tenure (preferably an acknowledgment of an annual performance review signed by the employee); and (3) an opportunity for the employee to respond to criticism and to change those behaviors the institution views negatively.

The employee's personnel file should also contain well-documented evidence of any complaint against the employee or record of disturbances created by the employee; what action was taken by the institution at that time; and what information was communicated to the employee concerning the institution's reaction to the disturbance or complaint. However, unless physically impossible, an institution should try to segregate from the employee's regular personnel record all records of investigations initiated on the basis of a complaint or allegation made by the employee.[73] The best home for such documents may be the office responsible for investigating the allegation or complaint.

Finally, the power of well-kept personnel files to persuade a judge that a discharge was not

73. For example, it may be impossible to separate the two records if the employee's complaint necessarily affects his position, i.e., as when an employee reports suspected misconduct by his immediate supervisor and then asks for a transfer until the investigation is complete.

motivated by a desire to retaliate against a whistleblowing employee is enhanced by a sense of balance. Therefore, an institution is well-advised to report and record good or even neutral comments about the employee as well as negative comments and incidents.

2. Maintain Meticulous Personnel Files on Any Employee Who Might File a Retaliatory Lawsuit. An institution should be particularly conscientious to document the activities and employment record of a troublesome employee or an employee it suspects may file a lawsuit alleging retaliatory behavior in connection with a whistleblowing incident. It is not discriminatory, retaliatory, or improper to thoroughly document problems with an employee's performance or incidents in which the employee is involved, even after the employing institution suspects the employee may file a retaliatory claim or after the employee has in fact filed such a claim. Although an ongoing performance review system which continually maintains such files is preferable, the lack of such a system should not paralyze the administration in the short term. Courts have recognized that once an employee makes a charge of retaliation against an employer, management often takes greater care to document the employee's misconduct, lest it be hauled into court and formally accused of retaliation.[74]

3. Consider Transferring the Whistleblower to Another Department or Job Site. Retaliation claims are often closely tied to a particular employee/supervisor relationship. Therefore, one measure short of termination which an institution can use to try to avoid a retaliation claim is to offer to transfer the employee to another department or job site. Courts seem to approve of employer efforts to transfer a whistleblower away from threatened retaliation, provided that the transfer is not disadvantageous to the employee. Transfer offers are sometimes good tactics as well.

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74. *See, e.g., Keith v. Computer Services Corp.*, 39 Fair Empl. Prac. Cas. (BNA) 1009, 1015 (N.D. Ga. 1985), aff'd, 788 F.2d 1568 (11th Cir. 1986) (holding that "there is nothing wrong with an employer's documenting its position"); *Smith v. Union Oil Co. of California*, 17 Fair Empl. Prac. Cas. (BNA) 960, 988 (N.D. Cal. 1977) (where a supervisor had admitted to "building a file" against an employee, the court found no retaliation, reasoning that the file was "merely a prudent assemblage of documentation with respect to an employee who had brought charges against the company").

especially if an employee refuses a transfer that a court later finds was entirely reasonable. In such a case, the employee's retaliation claim is undercut by the employer's demonstrated good faith efforts to accommodate the employee.

4. *Document Clearly the Termination of Any Employee Previously Involved in a Whistleblowing Allegation.* The complement to an adequately documented personnel record is a complete, written account of the institution's decision to terminate an employee. If such a decision is based solely on the employee's performance, the termination record should recount fully the reasons for the institution's negative evaluation of the employee, its efforts to reform the employee, and the employee's failure to respond to the criticisms leveled against him. If the termination is necessitated by economic or organizational factors, an institution should base individual termination decisions on an articulated, objective basis, which may or may not include performance criteria.

Before an institution terminates a whistleblower, it should review carefully whether the decision to terminate this particular employee is adequately grounded in fact. The institution should candidly evaluate whether the asserted reason for termination is not, in any way, a pretext for retaliation. In borderline cases, it is always advantageous to have the institution's general or outside counsel review both the personnel file and the termination notice and determine objectively whether the asserted reason for terminating the employee would stand up in court.

Finally, timing plays a very important role. Firing an employee shortly after the employee blew the whistle on an institutional practice understandably creates assumptions which may be difficult to counter, even with strong evidence that the institution had a legitimate reason to terminate the employee. Nonetheless, when an institution in effect is blackmailed by a poorly-performing employee who has threatened to file a retaliation claim, the institution almost certainly suffers in the long run. It is probably better to terminate such an employee and defend the retaliation claim, than continue to employ an individual whose poor performance adversely affects his colleagues and the institution as a whole.

NOTE: Readers may also be interested in the article, "Managing the Whistleblowing Employee," published by the Section of Labor and Employment Law, American Bar Association (The Labor Lawyer, *Vol. 8, No. 1 [Winter 1992]).*

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